DEC 29 1999 (10)

Supreme Court, U.S.
FILED
DEC 29 1999
CLERK

No. 99-5739

In the
Supreme Court of the United States

DEWEY J. JONES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Whether in light of *United States v. Lopez*, 514 U.S. 549 (1995), and the interpretive rule that constitutionally doubtful constructions should be avoided, *see Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988), Section 844(i) applies to the arson of a private residence; and if so, whether its application to the private residence in the present case is constitutional.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of reversal.[1] Written consent for amicus participation in this case was granted by counsel of record for all parties.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated in numerous cases concerning the scope of the Commerce Clause, federalism, and the constitutionality of various provisions of federal law. For example, PLF participated as amicus curiae before this Court in *Alden v. Maine*, 119 S. Ct. 2240 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); and *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), and is appearing as amicus curiae before the Court this term in *Reno v. Condon, cert. granted*, 119 S. Ct. 1753 (1999); and *United States v. Morrison, consolidated with Brzonkala v. Morrison, cert. granted*, 68 U.S.L.W. 3177 (1999).

PLF seeks to augment the arguments of Petitioners by further elucidating the inherent limitations on Congress'

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Article I authority under the Constitution. PLF believes its public policy perspective and litigation experience dealing with constitutional law will provide a unique viewpoint on the issues presented in this case. PLF believes this additional viewpoint will aid this Court in the resolution of this case.

STATEMENT OF THE CASE

Title 18, U.S.C. § 844, prescribes a federal criminal penalty for

> [w]hoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce . . . .

18 U.S.C. § 844(i). Petitioner Dewey Jones was convicted under this statute and sentenced to 35 years in federal prison for throwing a lit Molotov cocktail into his cousin's home. *See United States v. Jones*, 178 F.3d 479 (7th Cir. 1999). The connections to interstate commerce relied upon by the federal government were: (1) the house received natural gas that had traveled interstate; (2) the mortgage on the house was held by an out-of-state lender; and (3) the house was insured by an out-of-state insurer. *Id.* at 480.

Mr. Jones challenged his conviction, averring that his conduct could not be subject to federal prosecution because it lacked the requisite connection to interstate commerce. *Id.* at 479-80. The essence of his argument was that the statute could not be constitutionally applied to a residence *per se*, where the residence was not used in any commercial capacity. *Id.*

The United States Court of Appeals for the Seventh Circuit disagreed. The Seventh Circuit found that this Court's decision in *United States v. Lopez* required a showing that the statute regulate an activity that "substantially affects" interstate

commerce. And though it acknowledged that the asserted connections to interstate commerce were "pretty slight," *id.* at 480, it upheld the conviction, finding that the aggregated effects of supplying goods and services to homes, as well as the aggregate effects of arsons of houses, "substantially affect" interstate commerce within the meaning of *Lopez*. *Id.* at 480-81.

Mr. Jones petitioned this Court for a Writ of Certiorari. This Court granted the writ on November 15, 1999, *Jones v. United States*, 68 U.S.L.W. 3321 (U.S. Nov. 15, 1999) (No. 99-5739), to resolve a conflict among the circuits.

SUMMARY OF ARGUMENT

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court held that Congress' Article I power "[t]o regulate commerce . . . among the several states" allowed Congress to regulate interstate commerce directly, or those activities that "substantially affect" interstate commerce. Further, this Court held that one way Congress could meet the "substantially affects" standard was by including a "jurisdictional element" in a statute that "would ensure, through case-by-case inquiry, that the [conduct] in question [substantially] affects interstate commerce." *Lopez*, 514 U.S. at 561.

The federal arson statute, 18 U.S.C. § 844(i), contains a jurisdictional element. Specifically, it prescribes a federal criminal penalty against any person who burns "property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." *Id.* Despite the deceptively direct wording of this statute, there is considerable confusion among the lower courts as to what this statute regulates, and, in particular, how this Court's decision in *Lopez* affects the analysis of jurisdictional element statutes.

First, the lower courts disagree as to whether, after *Lopez*, jurisdictional element statutes require the government to show

"substantial effects" in order to sustain a federal prosecution, or whether *de minimis* effects on commerce suffice. Second, they disagree as to how the requisite connections to interstate commerce may be demonstrated in order to satisfy *Lopez*. And third, there is confusion as to what jurisdictional element statutes require in order to establish sufficient connections to interstate commerce in a given application.

As demonstrated below, because *Lopez* established, as a constitutional minimum, that Congress may only regulate those activities that "substantially affect" interstate commerce, conduct regulated under jurisdictional element statutes must similarly meet this requirement in order for the regulation to be constitutional. Any lesser standard would nullify the holding in *Lopez*--that is, if Congress could reach activities that only minimally affect interstate commerce through the employment of jurisdictional elements, it would be able to regulate matters that *Lopez* expressly held were beyond the reach of federal commerce authority.

Where Congress employs a jurisdictional element in a statute, Congress has made a policy choice to reach particular conduct that affects interstate commerce in a particular way. In construing such statutes, it is essential that courts interpret and apply these laws by reference to what, exactly, Congress sought to regulate. In particular, courts must take care that the interstate commerce connections identified by the federal government in seeking prosecutions under these statutes are consistent with the cast of the particular statute being applied. For example, in the federal arson statute, Congress did not seek to regulate *arsons* that affected commerce; rather Congress sought to regulate the arson of *properties used in* interstate commerce or used in activities affecting interstate commerce.

Further, in reviewing cases dealing with jurisdictional element statutes, courts must determine whether the application of the statute is sufficiently connected to interstate commerce on

its own facts, without reference to external facts or, especially, the aggregated effects of all similar conduct. By their own terms, jurisdictional element statutes are intended to reach a discrete subset of conduct that bears the requisite connections to interstate commerce; consequently, looking outside of the facts of a particular case defeats the entire purpose of the jurisdictional element and, more, contradicts the congressional intent to *limit* the reach of such statutes.

In order to meet the "substantial effects" standard established by *Lopez*, legitimate applications of jurisdictional element statutes ought to be limited to those cases in which the connections between the regulated conduct and interstate commerce are explicit and direct. This Court should find it constitutionally inadequate to uphold federal authority over noncommercial conduct where impacts on interstate commerce are trivial, speculative, or attenuated.

Finally, jurisdictional element statutes, by definition, attempt to regulate conduct that is not otherwise subject to federal regulation by creating a federal case only where federal interstate commerce interests are readily apparent. Consistent with this understanding, this Court should adopt a rule of construction that gives appropriate deference to the role of the states in governing matters that properly fall within their internal affairs, of which criminal law enforcement is a critical component. Accordingly, federal jurisdictional element statutes should be interpreted to reach only those cases where the federal interest in protecting interstate commerce from injurious or pernicious impacts is manifest.

With these considerations in mind, amicus respectfully requests that this Court REVERSE the decision of the court below.

ARGUMENT

I

CONSISTENT WITH *LOPEZ*, A FEDERAL COMMERCE CLAUSE ENACTMENT MAY ONLY REACH MATTERS THAT "SUBSTANTIALLY AFFECT" INTERSTATE COMMERCE; THUS, A FEDERAL STATUTE CONTAINING A JURISDICTIONAL ELEMENT APPLIES ONLY TO THOSE CASES WHERE THE FEDERAL GOVERNMENT CAN FACTUALLY DEMONSTRATE THAT THE CONDUCT IN QUESTION SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE

A. Statutes Containing a Jurisdictional Element Must Meet the "Substantially Affects" Standard, Because Any Lesser Standard Would Nullify This Court's Decision in *Lopez*

Article I, Section 8, Clause 3, of the United States Constitution grants Congress the power "[t]o regulate commerce . . . among the several states." In *United States v. Lopez*, this Court reaffirmed that there were "three broad categories of activity that Congress may regulate under its commerce power." *Lopez*, 514 U.S. at 558. The first category of activity that Congress may regulate is the use of the channels of interstate commerce. *Id.* Second, Congress may regulate and protect instrumentalities of interstate commerce, or persons or things in interstate commerce. *Id.* And finally, this Court held that Congress could regulate those activities that "substantially affect" interstate commerce." *Id.* at 559.

It is the last category of activities--those that "substantially affect" interstate commerce--that concerned this Court in *Lopez* and concerns the Court here. In analyzing how a statute could meet the "substantially affects" standard in *Lopez*, this Court explicitly recognized that a statute could be upheld as within Congress' Commerce Clause authority if it contained a "juris-

dictional element which would ensure, through case-by-case inquiry, that the [regulated activity] in question affects interstate commerce." *Id.* at 561-62. Section 844(i), the statute at issue here, contains a jurisdictional element. Specifically, this statute reaches only an arson that targets "real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i). Because the statute contains a jurisdictional element, the statute, on its face, may withstand a constitutional challenge. But what is at issue here is *which applications of the statute* can similarly withstand constitutional challenge.

In *Lopez*, this Court expressly placed jurisdictional element statutes within the category of congressional regulations that must satisfy the "substantially affects" standard. However, there is significant disagreement among the courts of appeals--and among the justices within individual courts of appeals--as to whether or how the "substantially affects" standard applies with respect to jurisdictional element statutes. For example, the Ninth Circuit, in *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995), found that the "substantial effects" standard was applicable to the arson statute at issue here:

> *Lopez* clearly holds that the connections to or effect on interstate commerce must be "substantial." The question is whether its analysis should be applied when the issue is how significant the contacts to interstate commerce must be in individual cases in order to assure the constitutionality of a statute that relies on a jurisdictional element. We hold that it does. We conclude that in a case such as this, where Congress seeks to regulate a purely intrastate noncommercial activity that has traditionally been subject to exclusive regulation by state or local government, and where the connection of the regulated activity as a whole to interstate commerce is neither readily apparent nor illuminated by express

> congressional findings, the government must satisfy the jurisdictional requirement by pointing to a "substantial" effect on or connection to interstate commerce.

Pappadopoulos, 64 F.3d at 527. It is hard to find a clearer statement of that court's belief that *Lopez* affects the analysis for jurisdictional element statutes. But less than two years later, the same court of appeals found that *Lopez*' "substantially affects" standard was *inapplicable* to federal Hobbs Act convictions, despite that statute's jurisdictional element requirement:

> The district court held that the Supreme Court's decision in [*Lopez*] overruled our well-settled rule that the government need show only a *de minimis* effect on interstate commerce to satisfy the Hobbs Act's jurisdictional element. . . .
>
> We have since held that *Lopez* did not render our use of the *de minimis* standard in Hobbs Act robbery cases constitutionally infirm.

United States v. Woodruff, 122 F.3d 1185, 1185-86 (9th Cir. 1997).

The depth of confusion displayed by these two widely divergent opinions coming out of a single circuit reflects the confusion that can be found throughout the lower courts. Of course, the Petitioner has already cited the depth of the conflict in the circuits on the question of the applicability of *Lopez*' substantial effects standard to jurisdictional element cases. *Compare, e.g., United States v. Rea*, 169 F.3d 1111, 1113 (8th Cir. 1999) ("*Lopez* is inapposite to convictions secured pursuant to section 844(i)"), *and United States v. Tocco*, 135 F.3d 116, 123-24 (2d Cir. 1998) ("We hold that in light of the fact that, unlike the statute in *Lopez*, § 844(i) *does* contain a jurisdictional element, *Lopez* did not elevate the government's burden . . . ."") (emphasis in original), *with United States v.*

Denalli, 73 F.3d 328, *modified on reh'g*, 90 F.3d 444 (11th Cir. 1996) ("*Lopez* required the government to prove that Federles' private residence was used in an activity that had a substantial effect on interstate commerce."). But on closer analysis, it becomes apparent that, even where courts of appeals may agree that *Lopez* raises the government's evidentiary burden to one of "substantial effects," the courts remain mystified as to *how* to apply that standard.

For example, the court below determined that *Lopez* requires even jurisdictional element crimes to meet the "substantial effects" standard. However, it proceeded to find that the "substantial effects" standard could be met by the aggregation of all arsons, and therefore it was immaterial whether the burned property was used primarily for residential or commercial purposes. *Jones*, 178 F.3d at 480-81. And though the Fifth Circuit recently concurred with the Seventh Circuit that all arsons could be aggregated for the purpose of federal jurisdiction, it nevertheless found that the jurisdictional element of the statute could only be met by "explicit" connections to interstate commerce, as opposed to "speculative" or "attenuated" ones. *United States v. Johnson*, 1999 WL 988249, *4 (5th Cir. 1999). And further, even though the Eleventh Circuit in *Denalli* concluded that *the particular arson in question* must substantially affect interstate commerce, *see Denalli*, 90 F.3d at 444, the same circuit appears to have recanted this analysis in *United States v. Viscome*, 144 F.3d 1365 (11th Cir. 1998), when it upheld a federal arson conviction for attempted bombing of a truck under the rationale:

> Because interstate truck leasing is itself a tangible component of interstate commerce, the truck necessarily was used in an activity *that in the aggregate has a substantial effect on interstate commerce*.

Id. at 1369 (emphasis added).

In sum, this Court is confronted by a peculiar set of conflicts within conflicts. The courts of appeals are divided over the fundamental question of whether *Lopez*' substantial effects standard applies to jurisdictional element crimes; further, even in those courts where the substantial effects standard is applied, the courts of appeal are unclear as to what, exactly, must substantially affect interstate commerce. As demonstrated below, if one is to take *Lopez* seriously, the answer to these questions is straightforward: *Lopez*' substantial effects standard must apply to jurisdictional element statutes, and the particular conduct to which the statute is *applied* must also substantially affect interstate commerce.

1. Congress May Regulate Activities That "Substantially Affect" Interstate Commerce, Not Activities That Merely "Affect" Interstate Commerce; Therefore, Any Statute, Whether or Not It Contains a Jurisdictional Element, Must Meet This Constitutional Minimum

In *Lopez*, this Court directly confronted the issue of whether Congress could regulate activities that merely "affect" interstate commerce or whether they must "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 559. This Court resolved the issue in favor of the latter standard; the Constitution allows Congress to regulate only those activities that substantially affect interstate commerce. *Id.* While this Court further held that Congress could meet this requirement through including a jurisdictional element in a statute, *id.* at 561-62, it never intimated that the mere presence of the jurisdictional element would somehow insulate all federal action taken pursuant to such statutes from constitutional challenge. Rather, the presence of a jurisdictional element may save a statute from facial challenge for the very good reason that the jurisdictional element serves to *limit* the statute's applicability. A jurisdictional requirement restricts a statute's "reach to a *discrete set* of [cases] that *additionally* have an explicit

connection with or effect on interstate commerce." *Id.* at 562 (emphases added). Thus, by definition, the federal arson statute *does not* reach all arsons of all property. Instead, it reaches a fixed subset of all arsons; specifically, an arson that affects property used in interstate commerce. *See* 18 U.S.C. § 844(i).

Admittedly, this Court did not expressly state that, where a statute has a jurisdictional element, the conduct being regulated must *substantially affect* interstate commerce, as opposed to merely "*affecting*" interstate commerce, or having "*de minimis*" effects on interstate commerce. But logic dictates that the regulated matter must "substantially affect" interstate commerce if *Lopez* is to mean anything at all. Otherwise, Congress could regulate activities having less than the constitutional minimum by the mere expedient of including jurisdictional elements in their statutes. For example, in *Lopez*, this Court held that Congress lacked the authority to regulate the possession of a gun in a school zone because the mere possession of a gun in a school zone did not "substantially affect" interstate commerce. *Id.* at 567. By the reckoning of some courts of appeals, not only could Congress have saved the statute itself by including a jurisdictional element in that statute (as it did, *see* 18 U.S.C. § 922(q)(2)(A)), but, it could have saved *virtually all applications of the statute*, because under the new statute, the conduct would only have to meet the new "*de minimis*" standard, rather than the "substantially affects" standard. *See, e.g., United States v. Melina*, 101 F.3d 567, 573 (8th Cir. 1996) (Adhering to *de minimis* standard, finding "[b]ecause the statute assailed in *Lopez* did not contain a similar jurisdictional element, and because the *Lopez* Court did not discuss the quantity of evidence necessary to satisfy such an explicit jurisdictional element, *Lopez* by its terms was inapposite."). But this Court could not have understood the "substantially affects" standard as a constitutional minimum if all constitutional infirmities could summarily be swept away with a few pen strokes. As stated above, the purpose of including a

jurisdictional element in a statute is to *limit its reach*, not merely insulate the statute from constitutional challenge.

By refusing to hold jurisdictional element statutes to the "substantially affects" standard in the wake of *Lopez*, the courts of appeals have essentially nullified *Lopez*' holding. That is, in the view of these courts, Congress may not generally regulate the possession of a gun in a school zone because possession of a gun in a school zone does not *substantially affect* interstate commerce. But now that Congress has added a jurisdictional element to that statute, Congress may regulate every possession of a firearm in a school zone if the firearm "has moved in or . . . otherwise affects interstate or foreign commerce" (*see* 18 U.S.C. § 922(q)(2)(A)). The *de minimis* standard has been interpreted by these courts to require so little in the way of interstate commerce impacts that the standard can be met *every time*. *See, e.g., United States v. Lewis*, 100 F.3d 49, 52 (7th Cir. 1996):

> It may be true that Lewis' individual possession of a gun did not have *much* of an impact upon interstate commerce. All we really know here is that the firearm was manufactured in Hungary and was too old to trace further; it may have been years, or even decades, then, since the gun had moved across state lines. . . . A single journey across state lines, however remote from the defendant's possession, is enough to establish the constitutionally minimal tie of a given weapon to interstate commerce, and to bring the defendant's possession of the gun within a framework of regulation whose connection to interstate commerce is more apparent.

As a result, the jurisdictional element does not become a limiting factor at all under the *de minimis* standard. Thus, even though Congress *theoretically* cannot regulate generally the possession of firearms per *Lopez*, it *in fact* may do so if it simply includes

a jurisdictional element in a statute. This is a nonsensical result. If the Constitution dictates that Congress may only regulate matters that substantially affect interstate commerce, Congress--and the courts--cannot negate the constitutional minimum through subterfuge.

If *Lopez* is to retain any meaning whatsoever, it must be understood to require that, where a statute contains a jurisdictional element, the particular activity to which the statute is applied must also "substantially affect" interstate commerce.

2. The Arson in This Case Does Not Meet the Statute's Requirement That the Property Be Used in Commerce or in an Activity That Affects Interstate Commerce

The Court below correctly held that the arson statute must be held to *Lopez*' substantial effects standard. It then applied a "substantial effects" standard to the arson statute by evaluating the effects of arson on interstate commerce. First, it held that arson of residential housing affected interstate commerce because of the existing commerce in building materials, gas and electricity services, insurance, and so on. It further held:

> If instead of asking whether "residential real estate" substantially affects commerce we ask whether "arson of buildings" or even "arson of residences" substantially affects commerce, the answer still must be yes. According to the Federal Bureau of Investigation, there were 69,269 reported arsons in 1997 . . . . Of these arsons, 33,848 involved buildings; and 19,888 of the buildings were residential . . . . The damage was a little more than $14,000 per residential arson. . . . That's a total of approximately $280 million lost to residential arsons in 1997 alone. If even a small fraction of the loss is covered by interstate insurance markets, the effect is "substantial." Most of these arsons also affected gas,

> electric, and telephone service, required the occupants to stay at hotels while repairs were completed (a sure sign of interstate commerce, *see Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964)), led friends and loved ones to travel from other states to give comfort to the victims, and so on. This collective effect, plus proof of a slight connection between the particular arson and interstate commerce, permits the national government to establish substantive rules of conduct.

Id. at 481 (citations omitted). In short, the Court held that the statute could be applied to this case because arson, in general, substantially affects interstate commerce.

Though the court's generalized conclusions may be rhetorically appealing, its findings ignore the cast of the statute. The court below was plainly in error when it framed the relevant inquiry as: "The statute requires proof that *the arson* with which the defendant is charged have some effect on commerce." *Id.* at 480 (emphasis added). On the contrary, the federal arson statute states, specifically:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property *used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce* shall be imprisoned for not less than 5 years and not more than 20 years . . . .

18 U.S.C. § 844(i) (emphasis added). The statute does *not* regulate *arsons* that affect commerce. By its own terms, the statute regulates the arson of *property* (1) *used* in interstate or foreign commerce; or (2) *used* in any activity affecting interstate or foreign commerce. Given this plain language, the Seventh Circuit's extended colloquy on the economic disruption caused

by the arson of private homes, as a general matter, is mystifying. The statute is entirely indifferent to that issue. The statute requires the commerce inquiry to focus *on the use of the burned property*.

Ironically, the Seventh Circuit unwittingly answered the correct question when it prefaced its flawed analysis with the phrase: "Although living in one's own house is not commerce . . . ." *Jones*, 178 F.3d at 480. This should have been the beginning and the end of the inquiry. The property in question, a residence, was used for "living in," a use that even the Seventh Circuit concedes is "not commerce." Merely *residing* is not a *use* in interstate or foreign commerce, nor is the activity of residing a *use* that, by its nature, substantially affects interstate or foreign commerce.

The proper analysis of commerce impacts under this statute does not look at the effect of the arson on commerce or on other externalities that may somehow connect the burned property to interstate commerce. Instead, the statute itself requires the commerce analysis to focus on *the use to which the burned property is put*. Indeed, in *Denalli*, the Eleventh Circuit specifically emphasized that this was the relevant analysis. *Compare*, *Denalli*, 73 F.3d at 330, *with Denalli*, 90 F.3d at 444 (original opinion stating: "*Lopez* required the government to prove that the *destruction of the Federles' private residence* had a substantial effect on interstate commerce," was modified on rehearing to: "*Lopez* required the government to prove that *Federles' private residence was used in an activity* that had a substantial effect on interstate commerce." (Emphasis added.) *See also United States v. McGuire*, 178 F.3d 203, 211 (3d Cir. 1999) (though the burned vehicle was sporadically used in owner's local catering business, Court held statute could not be applied where the asserted "'*uses* are so trivial or attenuated.'" *Accord*, *Pappadopoulos*, 64 F.3d at 527 ("The residence was *not used at all for commercial activity*. It was purely private."). (Emphasis added.)

The court below never asked, let alone resolved, the relevant question: whether the property in question was *used in* interstate or foreign commerce, or *used in* an activity that affected interstate or foreign commerce. Instead, it analyzed the statute--and the case--as though Congress had attempted simply to federalize the common law crime of arson, and as though the Petitioner challenged the facial validity of the arson statute. Unfortunately, this seems to be an error for which the lower federal courts are regularly culpable--even when their results are, in other respects, correct. *See, e.g., United States v. Johnson*, 1999 WL 988249, at *4 ("the government must show that *the arson* has 'an explicit connection with or effect on interstate commerce.'") (Emphasis added; citation omitted.) Thus, despite the deceptive simplicity of the point made here, it is patently one which requires clarification from this Court. *See also Melina*, 101 F.3d at 572-73 (despite fact that burned property was a restaurant, court did not look at use of property but upheld application of arson statute based on building's receipt of natural gas from out-of-state sources).

In construing the federal arson statute, and indeed any statute containing a jurisdictional element, this Court must look to the statute itself to identify the specific interstate commerce nexus that Congress sought to regulate, and frame its analysis in terms of the statute's explicit commerce requirements.

B. By Its Own Terms, a Statute with a Jurisdictional Element May Not Be Aggregated with Unconnected Cases; the Statute May Only Be Applied Where the Specific Facts of a Case Demonstrate the Requisite Connection to Interstate Commerce

The error of conducting the wrong commerce inquiry is compounded by the fact that courts of appeals are all over the scale when it comes to determining the activity to which the "substantially effects" standard ought to apply. In particular, like the court below, they look not only at the particular matter in question, but at the aggregate effects of *all similar matters*,

regardless of the fact that the actual matters in question may be completely unrelated. *See Jones*, 178 F.3d at 480-81 (aggregating all interstate commerce in building materials and gas and electricity services). Thus, in *United States v. Latouf*, 132 F.3d 320 (6th Cir. 1997), the Sixth Circuit upheld the application of the federal arson statute to the burning of a restaurant with minimal contacts to interstate commerce, stating:

> Although these contacts standing alone may not have been sufficient to demonstrate the requisite "substantial" effect on interstate commerce, this court must consider these contacts in the aggregate.
>
> . . . .
>
> Since *Wickard* still remains the controlling decision, we are bound by the aggregate theory and its attending inferences that *de minimus* interstate economic activity *can be substantial if taken in the aggregate*.

Id. at 327-28 (emphasis added).

The Sixth Circuit's analysis reflects a recent observation by Judge Garwood of the Fifth Circuit: "[E]very individual action no matter how local will ultimately have some at least minute interstate effect, and it will always and inevitably be the case that the aggregation of all such conduct would substantially affect interstate commerce." *Johnson*, 1999 WL 988249, at *8 (Garwood, J., specially concurring).[2] That is, if courts may indiscriminately aggregate activities for the purpose of Commerce Clause analysis, even conduct with *de minimis*

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[2] Judge Garwood suggests that if aggregation may be used at all it may only be used where the aggregated conduct is commercial--that is, where Congress is attempting to reach a "particular class of business or particular national market." *Johnson*, 1999 WL 988249, at *7 (Garwood, J., specially concurring).

effects will always be able to meet the "substantial effects" standard. But this inherent failing of the aggregation principle is particularly acute when aggregation is applied to jurisdictional element statutes, because the aggregation of all *similar* conduct utterly defeats the purpose of having a jurisdictional element in the first place. As the Third Circuit expressed it:

> We do not believe that the Supreme Court required Congress to include a jurisdictional element under *Lopez* only to have courts interpret the resulting statutes in such a way as to remove it.

McGuire, 178 F.3d at 212.

If the effects of all uses of property may be aggregated for the purpose of analyzing "substantial effects," the fundamental requirement that a reviewing court must undertake a "case-by-case inquiry" is nullified. *See Lopez*, 514 U.S. at 561. This cannot be the correct approach. Contrary to the Seventh Circuit's analysis, it is irrelevant if residential housing, as a whole, affects interstate commerce in building materials, electricity, gas, mortgages, insurance, or anything else, because such *generalized* activities do not create the *particularized* link between the use of the property in question and a substantial effect on interstate commerce as the statute requires.[3]

In general, it is not clear there is any proper place for use of the aggregation principle in Commerce Clause analysis, as it may be (and regularly is) employed to sustain any manner of federal legislation by the simple expedient of expanding the scope of activities that are aggregated. *See, e.g., Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 778

[3] Of course, the Seventh Circuit may believe that arson, in general, substantially affects interstate commerce, and therefore is a proper subject of federal regulation under the Commerce Clause. However, even if the Seventh Circuit believes that Congress may always regulate all arson, the court's analysis is flawed because the statute itself does not purport to regulate all arsons.

(2d Cir. 1999) (all municipal towing laws, in the aggregate, substantially affect interstate commerce); *National Association of Home Builders v. Babbitt*, 130 F.3d 1041, 1053-54 (D.C. Cir. 1997) (extinction of species, in the aggregate, will substantially affect interstate commerce); *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999) (destruction of bird habitat, in the aggregate, substantially affects interstate commerce). In short, as this case demonstrates, the aggregation test is inherently elastic--and, consequently, inherently susceptible to abuse.

The aggregation doctrine is entirely misplaced in the context of statutes containing express jurisdictional elements. By definition, jurisdictional elements are *limiting* provisions. *Lopez*, 514 U.S. at 561-62. With the federal arson statute, Congress did not attempt to regulate all arsons *per se*. Rather, Congress sought to regulate only those arsons that affected interstate commerce in a particular way. This Court should expressly disavow the aggregation principle as a means of validating the application of federal statutes containing jurisdictional elements.

II

FOR JURISDICTIONAL ELEMENT STATUTES, FEDERAL JURISDICTION MAY ONLY REACH CONDUCT WITH DIRECT AND SUBSTANTIAL EFFECTS ON INTERSTATE COMMERCE AND MAY NOT REACH INTRASTATE CONDUCT THAT IS MORE PROPERLY THE SUBJECT OF THE STATE'S GENERAL POLICE POWER

A. This Court Should Hold That, for Jurisdictional Element Statutes, Substantial Effects May Only Be Met by Explicit and Direct Connections to Interstate Commerce

As demonstrated above, jurisdictional statutes require that the regulated conduct must meet *Lopez*' "substantially affects"

interstate commerce standard. Further, a court reviewing a case involving a jurisdictional element statute may not look to outside facts to establish the interstate commerce nexus; rather, the jurisdictional element requirement, by definition, requires a court to look at the specific application of the statute to the facts before it to satisfy itself that the requisite nexus between the regulated conduct and interstate commerce exists. It remains to be seen, however, how close the nexus must be in order to constitute "substantial effects." Several courts of appeals have wrestled with this issue and devised various formulations in an attempt to construe the federal arson statute in a manner that is faithful to this Court's decision in *Lopez*.

In *United States v. McGuire*, the federal government sought to prosecute the defendant under the federal arson statute for placing a pipe bomb in his mother's car. The victim operated a local catering business, in which she occasionally used her car. First, the government argued that it needed only to establish *de minimis* effects on commerce in order to satisfy the jurisdictional element. *McGuire*, 178 F.3d at 208. Accordingly, its argument rested on an astoundingly thin reed:

> The evidence established that a bottle of Tropicana orange juice had been in the trunk of the Toyota when it exploded. The raw material for that orange juice was produced in Florida and then shipped by "tanker" truck to Reading Pennsylvania where it was packaged for home consumption and distributed . . . . Although the government conceded that the catering business itself was a small, intrastate activity, the prosecutor argued that *the bottle of orange juice was sufficient to satisfy the interstate commerce requirement* . . . .

Id. at 206 (emphasis added). On appeal, however, though the Third Circuit did not expressly find that *Lopez*' "substantial effects" standard was mandated, it was skeptical, in light of

Lopez, that *de minimis* effects were sufficient. *Id.* at 210. Accordingly, the government sought to bolster its case by alleging additional interstate commerce impacts, specifically, the additional presence of toothpicks and chicken in the trunk of the bombed car, the presence of fuel in the gas tank, and the car's occasional use in the victim's catering business. *Id.* at 206. The Third Circuit adopted the following standard:

> [W]e consider both the nature and frequency of that use, as well as the extent to which the [use] affected commerce, in deciding if the evidence supports the exercise of federal jurisdiction under *Lopez*.

Id. at 209. Notwithstanding the list of purported interstate commerce connections asserted by the government, the Third Circuit remained unconvinced that the government had met its burden, concluding that the asserted connections were too "trivial" and "attenuated" to confer federal jurisdiction.[4]

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[4] Surprisingly, the government never argued that *the car itself* was used in interstate commerce. While Amicus believes that this, too, is insufficient under the statute, the courts of appeals, including the Third Circuit, *see United States v. Bishop*, 66 F.3d 569 (3d Cir. 1995), have upheld the federal carjacking statute based on the fact that the carjacking statute contains a jurisdictional element applying only to a car "that has been transported, shipped, or received in interstate or foreign commerce," *see* 18 U.S.C. § 2119, and based on the theory that "cars are themselves instrumentalities of commerce, which Congress may protect." *United States v. Oliver*, 60 F.3d 547, 550 (9th Cir. 1995).

If this is all the jurisdictional element requires, the jurisdictional element method of sustaining federal commerce legislation is, at best, a legal fiction and, at worse, a farce. If passive conduct such as mere possession or status suffices to meet "in or affecting interstate commerce" elements, nothing is beyond federal power, because virtually no physical object encountered in modern life is wholly the product of intrastate materials, manufacture, or distribution. (*See, e.g.*, 18 U.S.C.

(continued...)

Similarly, in *Johnson*, the Fifth Circuit was not satisfied that the government had met its burden with respect to the arson of a church annex. *Johnson*, 1999 WL 988249, at *1. In that case, the asserted connections to commerce were: (1) the church collected funds which it (2) distributed to the national church, which in turn (3) distributed them to various other church organizations, and (4) an out-of-state insurer covered the arson claim. *Id.* at *5. The Fifth Circuit found these contacts insufficient, instead holding that the statute required the government to

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[4](...continued)
§ 922(g)(1) criminalizing the possession of firearm ammunition where the mere components (such as powder) once traveled in interstate commerce.)

Accordingly, if the federal commerce power is indeed limited, this Court should consider expressly overruling *Russell v. United States*, 471 U.S. 858, 861 (1985) (holding that rental property is, *per se*, "used in interstate commerce" because "local rental of an apartment unit is merely an element of a much broader commercial market in rental properties"), and *Scarborough v. United States*, 431 U.S. 563, 572 (1977) (holding that felon's possession of a firearm met the "in or affecting commerce" jurisdictional element where defendant had possessed firearm for an extended period of time and, significantly, *prior to* his felony conviction). In particular, as noted in Section I.A.1 above, if *Scarborough* remains the law, this Court's conclusion in *Lopez* that the Gun Free School Zones Act is invalid has been legislatively overruled by the inclusion of a jurisdictional element in that statute, which now requires that the possessed firearm "has moved in or that otherwise affects interstate or foreign commerce." Since it is statistically unlikely that there exists a firearm (or firearm component) that has not moved in interstate commerce, Congress may now regulate every instance of gun possession in a school zone despite this Court's express holding that Congress lacked the constitutional authority to regulate such conduct.

> show that the arson has "an explicit connection with or effect on interstate commerce." . . . A "speculative" or "attenuated" connection, however, will not suffice to demonstrate the nexus with interstate commerce.

Johnson, 1999 WL 988249, at *4 (citation omitted).[5]

In *Pappadopoulos*, the Ninth Circuit looked to the *Lopez* decision to find out if the use of the house burned in that case fell into the category of activities that Congress could traditionally regulate under its commerce power, specifically, the channels and instrumentalities of interstate commerce, or the interstate transportation of goods in interstate commerce. It found the application of the statute to the house burned in that case did not fall into these categories:

> [A] house has a particularly local rather than interstate character. Moreover, a private residence that merely receives natural gas from out-of-state sources is neither an article nor an instrumentality of

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[5] *But see* the Fifth Circuit's opinion in *United States v. Nguyen*, 117 F.3d 796 (5th Cir. 1997). In that case, the court upheld a federal arson conviction where the defendant placed a bomb in a truck. When the bomb exploded, it incidentally damaged part of a nearby apartment building. Relying upon this Court's holding in *Russell v. United States*, the Court held that the apartment "was property being ""used" in an "activity" that affects commerce,' and thus interstate commerce, within the meaning of § 844(i)." *Nguyen*, 117 F. 3d at 798. In dissent, Judge Jones pointed out that the apartment building suffered only minor and incidental damage that did not amount to "substantial effects" as required by *Lopez*: "Broken windows and split eaves do not make a federal case." *Nguyen*, 117 F.3d at 800 (Jones, J., dissenting). Judge Jones suggests that, after *Lopez*, *Russell* disposes of the case only if (1) the damaged property is targeted by the arson, and (2) interstate commerce is actually impaired by the arson. *Id.* at 799-800.

> commerce. The arson of such a structure has only a remote and indirect effect on interstate commerce.

Pappadopoulos, 64 F.3d at 527-28.

Though the analyses employed by these courts of appeals fall short of establishing a definitive test for determining whether an application of a jurisdictional element statute meets the "substantial effects" standard under *Lopez*, these cases are useful in pointing to the factors that go into an appropriate analysis. Specifically, for purposes of meeting a jurisdictional element requirement, "substantial effects" *cannot* be speculative, attenuated, trivial, remote or indirect. Rather, they must be *explicit*, *direct*, and, of course, *substantial*.

In this case, the total of the interstate commerce connections between the use of the property and interstate commerce asserted by the government were: (1) the receipt of natural gas from an interstate source; (2) the holding of the mortgage on the home by an out-of-state lender; and (3) the receipt of an insurance check from an out-of-state insurer. These incidental connections are too trivial and remote to amount to "uses" of the property for an "activity affecting interstate . . . commerce" as required by Section 844(i).

B. In Construing Jurisdictional Element Statutes, This Court Should Adopt a Rule of Construction That Gives Wide Latitude to the States in the Formulation of Civil and Criminal Policy with Respect to Internal Matters, and Sustain Federal Jurisdiction Only Where Federal Commerce Interests Are Manifest

At one extreme, it is relatively clear what types of connections to commerce are so attenuated as to be excluded from coverage under a federal jurisdictional element:

> For example, though the effect is highly attenuated, driving a few blocks to pick up one's children

> (consumption of gasoline refined from foreign oil, and wear and tear on vehicle manufactured in another state or country) or eating dinner in front of one's own television set (consuming food and beverages from outside of state or country, as well as decisions on how to spend hundreds of millions of advertising dollars), have an indirect effect on interstate, and often foreign commerce. Even such a seemingly parochial action as borrowing a cup of sugar from a neighbor can be viewed as part of the stream of commerce that extends to refineries overseas.

McGuire, 178 F.3d at 210 (footnote omitted). At the other extreme would be acts such as the bombing of an international jetliner or a transcontinental freight train. In the middle ground, however, where no bright line exists, this Court should remain cognizant of two considerations: the justification for federal legislation in the area of common law crime and due respect for the role of the states in governing the conduct of citizens under their general police power.

In *Lopez*, this Court was particularly careful to acknowledge the line between appropriate federal and state action and, in particular, balked at construing the federal commerce power to extend into matters that had *minimal effects* on interstate commerce, but *maximum potential* to interfere in state law matters. Though this Court did not attempt to erect inviolable boundaries between federal and state responsibilities, the *Lopez* decision was premised upon the basic principle that federal power is limited in the area of crime, while state police powers were plenary. *Lopez*, 514 U.S. at 553. Underlying this principle was a further consideration for the principle of federalism:

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional

> authority under the Commerce Clause to *a general police power of the sort retained by the States.*

Id. at 567 (emphasis added).

While Congress may federalize some crimes, states "'"possess [the] primary authority for defining and enforcing criminal law,"'" *id.* at 561 n.3 (citation omitted), and criminal law is an area "where States historically have been sovereign," *id.* at 564. This division of responsibilities, though not absolute, is not merely based on the idea that common law crimes, such as arson, are inherently local (or even personal, in the sense that the effects are often not felt beyond the individual victim); more critically under our constitutional system, the division is fundamental to retaining a federal-state balance. That is, if the federal government may reach through its commerce powers all conduct that the states may reach through their police powers, the federal government would possess the ability to override and displace state criminal law schemes entirely. This is intolerable under our federal system. As this Court observed in *Lopez*:

> ("... Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States"). When Congress criminalizes conduct already denounced as criminal by the States, it effects a "'change in the sensitive relation between federal and state criminal jurisdiction.'" ... [The Gun Free School Zones Act] "displace[s] state policy choices in ... that its prohibitions apply even in States that have chosen not to outlaw the conduct in question."

Lopez, 514 U.S. at 561 n.3. Thus, when the federal government criminalizes arson, the issue is not a "neutral" one--that is, even though arson is unlawful under either scheme, it is not just a question of who will prosecute. Instead, the question is: Under

our federal scheme, which sovereign should govern this conduct?

Like the gun possession statute at issue in *Lopez*, arson is not a crime that begs for a federal solution; arson, as a crime, has roots in the common law and is unlawful in every state. So while Congress may reach arson under certain circumstances, concern for the potential for the abuse of federal power through overreaching into state affairs should militate in favor of a skeptical view of federal interference in the arena of criminal law. In particular, federal prosecution is *not* justified where it simply displaces, wholesale, state criminal law and state criminal law enforcement with no manifest federal purpose. As one court expressed it in a pre-*Lopez* decision:

> Indeed, apparently irresistible political pressures to be perceived as "tough on crime" are driving Congress to federalize crimes such as that here charged, in circumstances where clear-minded, objective analysis can discern *no meaningful effect on interstate commerce in the sense intended by the Commerce Clause.*

United States v. Ornelas, 841 F. Supp. 1087, 1093 (D. Colo. 1994) (emphasis added).

Where the interstate commerce impacts are so significant that a particular act can be understood to be a proper subject of federal authority, federal prosecution is justified. But where a federal statute serves merely to displace state action and state policy, federal courts--and federal prosecutors--should be constrained. In other words, rather than deferring to federal power as a general policy, in the area of criminal law, this Court ought to adopt a policy of deference in favor of protecting *state* authority. Accordingly, for example, the Ninth Circuit in *Pappadopoulos* did not concern itself so much with the uncontroversial point that arson should be unlawful; it simply concluded: "This is a simple state arson crime. It should have

been tried in state court." *Pappadopoulos*, 64 F.3d at 528. Marginal and dubious federal justifications may not trump state plenary authority.

Jurisdictional element statutes should be interpreted in light of the basic understanding that Congress is intentionally and explicitly intruding into areas of law reserved to the states--indeed, if federal authority were unquestioned, a jurisdictional element would be superfluous. Consequently, a jurisdictional element statute such as the arson statute at issue here should be construed to reach only those arsons where the use of the property is so inextricably connected to interstate commerce that the arson could legitimately be said to impair or impede interstate commerce. Such an interpretation would give due consideration to the role of the states under our federal system at the same time that it would give Congress the power, appropriately, to prescribe the laws that govern suitably *federal* interests--specifically, the protection of interstate commerce.

As stated above, jurisdictional element statutes are, by their nature, of limited application, and those limits ought to be defined by a line that respects the responsibility of the state to govern its own affairs. As observed by the Second Circuit in turning back a federal prosecution under the Hobbs Act,

> [i]t is the sensitive duty of federal courts to review carefully the enforcement of our federal criminal statutes to prevent their injection into unintended areas of state governance . . . . Exercising that duty, we find it necessary to nullify this attempted application of the Hobbs Act to circumstances it was never meant to reach. Incremental extensions of federal criminal jurisdiction arguably present a more pernicious hazard for our federal system than would a bold accretion to the body of federal crimes. At a minimum, a clear extension of federal responsibility is likely to be sufficiently visible to provoke inquiries

> and debate about the propriety and desirability of changing the state-federal balance. Less abrupt, more subtle expansions, however, such as nearly occurred here, are less likely to trigger public debate, and, yet, over time cumulatively may amount to substantial intrusions by federal officials into areas properly left to state enforcement. By holding that the Hobbs Act does not encompass state-law commercial bribery, we seek to demarcate a point beyond which congress intended federal prosecutors not to pass.

United States v. Capo, 817 F.2d 947, 955 (2d Cir. 1987). The line between federal and state jurisdiction may not be bright, but it must exist and it must be conscientiously observed if federalism, and the liberties conferred upon the citizenry by federalism, is to remain viable and, more, robust.

CONCLUSION

In *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991), this Court stated: "In the tension between federal and state power lies the promise of liberty." in construing the Commerce Clause, this Court should remain faithful to the promise of liberty embodied in the Constitution--a promise *Lopez* reaffirmed. Accordingly, the commerce power must be understood as limited by the context of the overall constitutional scheme that sought to divide government power between the federal government and the states by delegating authority over certain specified objects to the federal government, and leaving a residual power in the states to regulate their own affairs.

By construing the federal arson statute to reach conduct bearing no special basis for warranting the extraordinary exercise of federal commerce jurisdiction into a matter of state criminal law, the court below construed federal power in a manner fundamentally inconsistent with the federal scheme of the Constitution.

Accordingly, amicus respectfully submits that the decision of the court below should be REVERSED.

DATED: December, 1999.

Respectfully submitted,

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